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In the Supreme Court of the United States

OCTOBER TERM, 1956

ALLEN M. WAINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Comstock v. *Comm'r of Internal Revenue*, 333 U. S. 211
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Statutes:

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of two taxpayers who were jointly and severally liable was intended to release only the taxpayer agreeing to the compromise and did not release the other taxpayer from his liability for the balance.

STATUTES INVOLVED

The relevant portions of Revised Statutes, Section 3251, and Section 3761 of the Internal Revenue Code of 1939 provide:

Revised Statutes:

> SEC. 3251. * * * Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid.

Internal Revenue Code of 1939:

SEC. 3761. COMPROMISES.—

> (a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

* * * * *

(26 U. S. C. 1952 ed. 3761.)

STATEMENT

In November, 1935, investigators of the Alcohol Tax Unit seized an unregistered distillery in Willis County, Illinois, together with a large quantity of mash, alcohol in vats and cans, all of which was non-tax paid. An additional quantity of non-tax paid alcohol was seized from a truck. Taxpayer was indicted with Harry Braverman and others for illegal possession of an unregistered distillery, and for other offenses in connection with the operation of this distillery. Taxpayer pleaded guilty to the charges in the indictment and sentence was duly imposed. (R. 89-90.)

On or about August 23, 1938, the Commissioner of Internal Revenue assessed taxes against taxpayer and Harry Braverman at the rate of $2 per proof-gallon on 7,542.36 proof gallons of alcohol, 7,413.24 proof

gallons of alcohol in mash, and 1,000 wine gallons of miscellaneous distilled spirits produced at such unregistered distillery. This assessment, totaling $31,911.20, appears on the books of the Collector of Internal Revenue for the First Illinois District on the July 1938 Distilled Spirits List. Notices and demands for payment were made, and taxpayer signed collection waivers extending to December 31, 1950, the time within which collection could be made or a proceeding in court begun. (R. 90.)

On February 3, 1941, Harry Braverman submitted a $5,000 offer in compromise on Form 656–C, together with a statement of facts and a financial statement, both of which are referred to in the offer (Exs. 26, 27, 34, R. 26–28, 54–63, 85–87, 93). Also on February 3, 1941, Harry Braverman executed a statement and filed it with the Collector in conjunction with the offer submitted on Form 656–C, in which he stated (Ex. 28, R. 27, 63–64):

> My Liability to pay the balance of said tax, penalties and interest, remaining after deducting from the assessment the amount hereby tendered, collection of which balance shall not be enforced against me by suit or any other proceeding; it being understood that this undertaking shall not release any other person from liability under said assessment.

The abstract and statement which records the action taken by the Commissioner of Internal Revenue show that, in considering and concluding to accept the offer in compromise, he had this statement before him. It was considered as a part of the terms

of the offer in conjunction with the Form 656-C. The offer was accepted with the provision that only the name of Harry Braverman would be removed from the $31,911.20 assessment made against him and taxpayer. (Exs. 30–33, R. 27, 70–84, 93–94.) The release given to Braverman was not intended to operate as a release of taxpayer's liability, and the Government reserved its rights to collect the balance from taxpayer (R. 50–51, 94).

This action was brought by the United States against taxpayer to recover the balance of the taxes, plus penalty and interest, assessed on the distilled spirits and alcohol seized at the illicit distillery (Complaint, as amended, R. 3–7, 11–13). Judgment was entered December 5, 1952, in favor of the United States for the balance due and costs, less a credit of $5,000. On appeal the Court of Appeals held that the taxes involved were properly assessed against the taxpayer, and that in the absence of a saving clause the release of one of two or more joint and several obligors would release them all; but since the release was not a part of the record, it remanded the case for the purpose of determining whether or not the release did in fact contain a saving clause showing an intention to keep alive taxpayer's liability. (*United States* v. *Wainer*, 211 F. 2d 669.)[1] On remand, addi-

[1] The court stated in this connection that (p. 673):

"* * * if the release of Braverman was without any savings clause to show that the intention of the parties was to keep alive the liability of Wainer, the release of Braverman must be considered as also releasing Wainer.

"If, on the other hand, the release given to Braverman showed by its language that the parties intended that the release should

tional pleadings were filed, exhibits were introduced in evidence, and witnesses were heard on that issue (R. 13–87).

The District Court found that the saving clause constituted a part of the compromise agreement, that the Government intended to and had effectively preserved its right against the taxpayer, and that the release of Braverman merely extinguished his separate individual liability and not that of the taxpayer (R. 50–53, 92–95). The Court of Appeals affirmed (Pet. App. 1a–6a).

ARGUMENT

The factual issue in the case is whether, in releasing one of two joint and several tax obligors, the Government intended to reserve its rights as against the other. Both courts below answered the question in the affirmative, and the record amply supports their conclusion. There is no conflict as to the legal effect of such a release nor any other reason for further review.

1. The distilled spirits tax in controversy was duly assessed against both taxpayer and Braverman, and by virtue of Revised Statutes, Section 3251 (*supra*, p. 2), they were "jointly and severally liable" for the tax. Taxpayer challenges (Pet. 13–15) the District Court's conclusion (R. 50–51, 94), concurred in by the court below (Pet. App. 3a), that in accepting the compromise offer from Braverman the Govern-

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not operate as to Wainer's liability, Wainer is still liable, and the $5,000 paid by Braverman should only serve to reduce the total debt by that amount as of the time of its payment, and Wainer is liable for the balance remaining unpaid."

ment intended to reserve its right to collect the balance from taxpayer. In so doing taxpayer disregards the plain tenor of the saving clause executed the same day as the compromise offer (Ex. 28, R. 27, 63–64), as well as the other evidence which the court below carefully reviewed (Pet. App. 3a–6a) in affirming the District Court. Taxpayer attempts to avoid the effect of the saving clause on the theory (Pet. 13–14) that it appears in a separate document rather than on the release given to Braverman, and that the release must be viewed by itself without reference to related documents. But the record fully warrants the conclusion of both courts below that the document containing the saving clause was an integral part of the compromise arrangement reached between the Government and Braverman.[2] In the words of the

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[2] Taxpayer argues that the courts below permitted an alteration of the terms of the release by circumstantial evidence (Pet. 13–14). As in the courts below, he seeks to draw some significance from the fact that Exhibit 28 was sworn to before a different individual than the person acknowledging Braverman's signature on the compromise offer, Form 656 C and attached statement of financial condition (Exs. 26, 27, 28, R. 54–63). However, the record contradicts taxpayer's inference (Pet. 14–15) that Exhibit 28 may relate to some other offer, for Braverman's sworn statement of his financial condition certifies that he had no other federal taxes then due and unpaid (R. 58). The court below accordingly properly attached no significance to the fact that a different party acknowledged Braverman's signature (Pet. App. 1a).

The record is likewise clear that the Government's reservation of rights against taxpayer was intended to constitute an integral part of the release to Braverman. The abstract, statement, and related papers constituting the action of the Internal Revenue Service on the offer (Ex. 30, R. 70–79) indicate, as both courts below found (Pet. App. 5a–6a, R. 93–94),

court below (Pet. App. 6a), when the evidence is "viewed in its entirety, the conclusion is inescapable that the saving clause constituted a component part of the compromise agreement whereby the government effectively preserved its rights against the taxpayer in question." Whether the Government intended to and did reserve its rights against taxpayer when it released Braverman is essentially a question of fact. Both courts below having decided the question adversely to taxpayer on the basis of substantial supporting evidence, their concurrent finding is entitled to finality here. *Comstock v. Group of Investors*, 335 U. S. 211, 214; *Corn Products Co. v. Commissioner*, 350 U. S. 46, 51.

2. There is no merit in taxpayer's alternative contention (Pet. 11–12, 17–20) that the Government lacks authority to accept a compromise offer from one of two joint and several tax obligors unless it also releases the other from liability for the balance. Section 3761 of the Internal Revenue Code of 1939 (*supra*, pp. 2–3) vests in the Commissioner broad authority to compromise tax cases. The decision below is in harmony not only with the authority delegated to the Commissioner by that section, but with the established rule that a creditor may accept a compromise

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that the Commissioner in considering the offer had before him the statement of Braverman reserving the Government's right to proceed against other persons (Ex. 28, R. 63–64), and that the Commissioner considered this statement as part of the offer. Moreover, as the court below also pointed out (Pet. App. 6a), the Serial Number 113 assigned to the offer (R. 55), was referred to in the abstract and statement recording the action taken by the Commissioner, as well as in the letter to Braverman accepting his offer (Ex. 30, 33, R. 27, 70–79, 84).

offer from one of a number of joint and several obligors while reserving his rights against the others. *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 132; *Mason* v. *Eldred*, 6 Wall. 231, 235; *McKenna* v. *Austin*, 134 F. 2d 659, 664, 665 (C. A. D. C.); *Husky Refining Co.* v. *Barnes*, 119 F. 2d 715 (C. A. 9th); *United States* v. *Hess*, 60 F. Supp. 333 (W. D. Pa.), affirmed, 154 F. 2d 291 (C. A. 3d); *Kaspar American State Bank* v. *Oak Homestead Ass'n*, 301 Ill. App. 326.[3] The Government, no less than other creditors, is entitled to the benefit of this rule. To subscribe to taxpayer's contention that the Government is powerless to accept a compromise offer from one of two joint and several tax obligors, without releasing the other, would place restrictions upon the Government's right to compromise tax cases which Congress did not see fit to impose. And, as the court below noted (Pet. App. 5a), "it would hamper not only the government in effecting a compromise, but also the taxpayer under certain circumstances."

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[3] As the court below pointed out in its earlier opinion (*United States* v. *Weiner*, 211 F. 2d 669, 672), the Illinois cases are substantially in accord with the common law rule that where language in the release of one joint and several obligor reserves the right to proceed against the others the release is regarded as a covenant not to sue. *Viken* v. *Insull*, 122 F. 2d 746, 751 (C. A. 7th); *Mueller, Exr.* v. *Babschutz*, 89 Ill. 476; *Parmelee* v. *Lawrence*, 44 Ill. 405, 413-414; *Forster* v. *Sheridan Trust & Savings Bank*, 257 Ill. App. 463; *Vickerson* v. *Suplee*, 171 Ill. App. 136; see also *Progress Laundry Co.* v. *Schavilk*, 332 Ill. App. 408; *Nixon* v. *City of Chicago*, 242 Ill. App. 365; Restatement of Torts, Sec. 885; Tellier, Annotation, 20 A. L. R. 2d 1044 (1951); cf. *Rice* v. *Webster et al.*, 18 Ill. 331; *Benjamin* v. *McConnell*, 9 Ill. 536.

Taxpayer is scarcely in a position to complain, as he does (Pet. 11–13, 17–19), that the decision below is "inequitable and unjust" in that it permits the Government to collect a part of the tax from Braverman and thereby "shift" liability for the tax to him. Since taxpayer was jointly and *severally* liable with Braverman for the full amount of the tax (Revised Statutes, Section 3251), the Government could have collected the full amount of the tax from him alone. Indeed, to the extent that the Government succeeded in collecting a part from Braverman, and thus reducing the amount owing, taxpayer was benefited.[4] As the court below observed (Pet. App. 6a), "taxpayer evidently fails to recognize the significance of a joint and several assessment whereby the Government could single out any one of the assessed taxpayers and proceed against him for the entire amount of the assessment without any basis for complaint on his part."

Equally without substance is taxpayer's contention (Pet. 17) that Code Section 3761, which lodges in the Commissioner authority to compromise tax cases, is "unconstitutional as a delegation of the taxing power" of Congress. In exercising his statutory authority to compromise tax liability the Commissioner obviously is not exercising a legislative power to levy taxes, as taxpayer mistakenly supposes, but is merely settling a tax liability already imposed by Congress.

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[4] Moreover, taxpayer points to no legal obstacle to assertion of his right to contribution from his co-obligor, Braverman.

3. Finally, taxpayer argues (Pet. 21–22) that in accepting Braverman's compromise offer and reserving its rights against taxpayer the Government did not follow the procedure outlined in an interoffice memorandum addressed by the Commissioner to the Collectors of Internal Revenue (Ex. 29, R. 61–70). To begin with, as the court below took pains to point out, the procedure suggested in the memorandum was in this case "substantially complied with" (Pet. Appx. 4a–5a). Besides, as the court below also noted (Pet. Appx. 5a), the procedure outlined in the interoffice memorandum was not mandatory. *See Williamson v. United States*, 208 Fed. 137 (C. A. 5th).

4. The decision below is not in conflict with any other decision, and taxpayer points to no conflicting decisions. The cases upon which he relies bear no resemblance to this one, and involved issues far removed from those here presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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